No. 47687-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDRES SEBASTIAN FERRER,

APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Greg Gonzales

# SUPPLEMENTAL BRIEF OF APPELLANT

NEIL M. FOX
Attorney for Appellant
WSBA No. 15277
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: (206) 728-5440
Fax: (866) 422-0542
Email: nf@neilfoxlaw.com

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## A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Appellant Andres Ferrer assigns error to the entry of the judgment and sentence. CP 79-93.

2. The trial court erred by giving the jury Instruction No. 10, which defined "disfigurement" as something that "impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." CP 47 (attached in Appendix A).

## B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Did Instruction No. 10, defining "disfigurement" according to subjective standards of beauty, allow the jury to convict Mr. Ferrer based upon racist and sexist stereotypes in violation of the United States and Washington Constitutions?

2. Did Instruction No. 10 lessen the State's burden of proof in violation of the United States and Washington Constitutions?

## C. SUPPLEMENTAL STATEMENT OF THE CASE

Assault in the second degree is defined, in part, as assaulting another "and thereby recklessly inflict[ing] substantial bodily harm." RCW 9A.36.021(1)(a). The jury was instructed on this element of assault, as well

as the "strangulation" alternative under RCW 9A.36.021(1)(g), Inst. No. 7, CP 44, but the jury returned a special verdict stating it was only unanimous as to the alternative means of "substantial bodily harm" prong. CP 71.

Instruction No. 9, CP 46, defined "substantial bodily harm" according to the statutory definition in RCW 9A.04.110(4)(b). This instruction allowed the jury to convict Mr. Ferrer if it concluded he caused "temporary but substantial disfigurement" of Kristina Ferrer.[1]

"Disfigurement" is not defined in Title 9A of the Revised Code of Washington. However, the State proposed, Supp. CP ___, and the trial court gave the jury, an instruction that defined "disfigurement" by reference to a dictionary definition that included impairment of "beauty" and making someone "unsightly" or "imperfect":

> "Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

Inst. No. 10, CP 47 (App. A).

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[1] Instruction No. 9 stated:

> Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ.

CP 46.

Although during the preliminary discussion of this instruction, counsel did not object, RP III 556, during the second round of discussions, counsel for Mr. Ferrer excepted to the proposed instruction, RP IV 706-712.[2] Specifically, counsel stated:

> I'm – *I'm going to object to your instruction* – proposed instruction Number 10 – *State v. Atkinson* [,113 Wn. App. 661, 54 P.3d 702 (2002)]. Disfigurement is something that is in the common understanding of people – people determine what words mean. We have twelve people here to make that determination.
>
> It's not a required form. The State does not need that to argue their case. I believe it is unnecessary and I believe that it may actually lower the burden of – of proof.
>
> So I – based upon all that Judge I – I don't think we need it and I *do object to it*. . . .
>
> . . .
>
> I just – I believe – because it offers so many possibilities – you know – it should just be something left up to the common understanding of the jury. . . .
>
> . . .
>
> Well – I mean – you know – impairs the beauty, symmetry and then you get down to misshapen – imperfect – unsightly – deforms in some manner. You get a lot of different definitions there. I don't know why we need such a

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[2] The court had earlier stated that "we'll take up formal objections after we complete round one of our instructions." RP III 550. Thus, while counsel did not object during the first round, he did object during the next round.

> broad definition when the jury is likely to understand the word anyway – they've been using it since they were kids.

RP IV 706-09 (emphasis added). Later, after the judge had already ruled that he would use the proposed instruction, he then stated, "Let's formally go through these for a complete record." RP IV 729. At that point, defense counsel stated he had no exceptions to Instruction No. 10. RP IV 731.

In closing, the State used the definition of disfigurement in Instruction No. 10 to argue that Mr. Ferrer was guilty even if he did not strangle Ms. Ferrer, telling the jury that the bruising on Ms. Ferrer was asymmetrical and significant enough that she felt like she could not go to work or go out in public. RP V 757-59.

Mr. Ferrer challenged Instructions Nos. 9 and 10 in his *Statement of Additional Grounds* (pp. 9-11). In its original opinion, affirming the conviction, this Court rejected the challenge, citing a failure to object. *State v. Ferrer*, No. 47687-8-II (8/16/16), Slip Op. at 13.

Mr. Ferrer sought review in the Supreme Court. By way of a supplemental petition, he raised a more detailed challenge to Instruction No. 10. On February 7, 2017, the Supreme Court entered the following order:

> Petition for review granted on issue of the jury instruction regarding disfigurement only & remanded to Court

of Appeals to address issue on the merits; review of remaining issues is denied.[3]

## D. ARGUMENT

### 1. *Introduction*

The trial court gave the jury an instruction that defined "disfigurement" as something which "impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." Inst. No. 10, CP 47. This instruction allowed the jury to convict Mr. Ferrer based upon racist and sexist stereotypes and lowered the burden of proof. The instruction therefore violated a series of constitutional provisions, including the right to due process of law, equal protection and a jury trial, under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21 and 22 of the Washington Constitution, as well as the prohibition on judicial comments on the evidence and the Equal Rights Amendment of the Washington Constitution. Const. art. IV, § 16; Const. art. XXXI, § 1.

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[3] Http://www.courts.wa.gov/appellate_trial_courts/supreme/index.cfm?fa=atc_supreme.display&year=2017&petition=pr170207); noted at *State v. Ferrer*, 187 Wn.2d 1009, 388 P.3d 500 (2017).

Given the dispute over whether this case was an assault in the fourth degree or whether it was an assault in the second degree, the error is not harmless and the Court should reverse the conviction.

### 2. *The Challenge to Instruction No. 10 Was Preserved and Can Be Reviewed by This Court*

In response to Mr. Ferrer's SAG, the Court initially rejected the challenge to Instruction No. 10, ruling that Mr. Ferrer failed to object to the instruction. Slip Op. at 13. With all due respect, this conclusion incorrect.

Mr. Ferrer's attorney specifically argued against the instruction, stating clearly, on two occasions, that he objected to it. RP IV 706-09. Although he did not initially object to the instruction, and did not formally repeat the exception later, RP IV 731, the rules do not require a second "formal" exception. CrR 6.15(c) states:

> (c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

Mr. Ferrer's attorney complied with this rule. RP IV 706-09.

As for not taking "formal" exception later, there is no requirement that the attorney repeat his previous objection. CrR 8.6 provides:

> Exceptions Unnecessary. CR 46 shall govern exceptions to rulings and orders in criminal cases.

CR 46 provides:

> Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Accordingly, Mr. Ferrer's lawyer properly objected to Instruction No. 10 at the time that the trial court was considering whether or not to include the instruction in the final packet. Defense counsel did not need to repeat his exceptions "formally" again, at a later time.[4]

In any case, the issues involving Instruction No. 10, discussed *infra*, are all constitutional in nature, and had practical and identifiable

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[4] *See Gamboa v. Clark*, 180 Wn. App. 256, 266, 321 P.3d 1236 (2014), *aff'd* 183 Wn.2d 38, 348 P.3d 1214 (2015) (party need not take formal exception to ruling of court, if previously made known his or her objection); *Queen City Farms v. Cent. Nat'l Ins. Co.*, 64 Wn. App. 838, 850-53, 827 P.2d 1024 (1992), *aff'd* 126 Wn.2d 50, 882 P.2d 703 (1994) (having apprised trial court of objection to use of particular standard of liability, party did not need to formally except to later special verdict form).

consequences in the trial, given the evidence and the nature of the defense. Thus, the issues are properly considered for the first time on appeal under RAP 2.5(a)(3), whether or not Mr. Ferrer's attorney did not renew his exceptions. *See State v. Kalebaugh*, 183 Wn.2d 578, 583-85, 355 P.3d 253 (2015).

### 3. *Inst. No. 10 Allowed the Jury to Convict Mr. Ferrer Based Upon Improper Racist and Sexist Stereotypes*

In order to convict Mr. Ferrer of second degree assault, the jury had to find that he inflicted "substantial bodily harm," defined in relevant part by statute as "bodily injury which involves a temporary but substantial disfigurement." RCW 9A.36.021; RCW 9A.04.110 (4)(b). The statute does not define "disfigurement." However, an instruction similar to the one given here, based upon dictionary definitions, was reviewed and approved by Division Three in *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002). The court there said the instruction merely "supplemented and clarified" the statutory language. *Id.* at 668.

*Atkinson* should not be followed in this case. Its holding is limited, and outdated, and has been superseded by later cases. In fact, the instruction on "disfigurement" did not"clarify" the statutory language at all, and allowed the jurors to use constitutionally improper factors involving race or gender

when determining whether Mr. Ferrer was guilty of a felony or a gross misdemeanor.

One of Mr. Ferrer's major defenses was that the case was overcharged and that he was guilty only of assault in the fourth degree. This strategy was reflected (a) in defense attempts to cross-examine the lead detective about how the case "grew" from a gross misdemeanor to a felony, (b) to the *provision* to the jury of a lesser-included offense instruction for assault in the fourth degree, (c) to the highly contested, and somewhat successful, attempt to discredit Kristina Ferrer's claims to have been strangled and (d) to the argument to the jury that this case was simply a fourth degree assault (RCW 9A.36.041). RP I 26-35; RP II 205-06; RP III 474-86, 535-36; RP V 772-74, 789, 795, 798-800; CP 57-58. Because the jury was not unanimous that the State proved assault by strangulation, and was unanimous only as to the "substantial bodily harm" prong of assault, CP 71, the definition of "substantial bodily harm" was highly significant.

As noted, in Instruction No. 9, the jury was instructed, according to the statutory definition in RCW 9A.04.110(4)(b), that "substantial bodily harm means bodily injury that involves a, temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment

of the function of any bodily part or organ." CP 46. In some past cases, excessive bruising has been held to be sufficient to meet this element. *See, e.g., State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruise marks on three year old child caused by shoe with rigid sole). However, bruising and swelling are not always indicative of substantial disfigurement and their presence do not always constitute assault in the second degree. *See State v. Dolan*, 118 Wn. App. 323, 330-32, 73 P.3d 1011 (2003), *overruled on other grounds in State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (improper to give instruction to the jury that bruising and swelling can constitute substantial bodily harm). Otherwise, almost any simple assault that resulted in a swelling or a bruise would be automatically ratcheted up to a Class B felony, thereby eliminating any reasoned distinction between assault in the fourth degree under RCW 9A.36.041and assault in the second degree under RCW 9A.36.021.

In Mr. Ferrer's case, the trial court went one step beyond giving the jury an instruction that bruising itself can constitute substantial bodily harm. The trial court gave the jury an instruction that defined "disfigurement" in a manner not reflected in the statute, defining it to include impairment of

"beauty," impairing "symmetry," injuring the "appearance of a person," and making someone "unsightly" or "imperfect." Inst. No. 10; App. A.

Yet, the determination of beauty, unsightliness or imperfection is an inherently subjective process, which by necessity is tied to the perpetuation of racist and sexist stereotypes.[5] While attempts to ban discrimination based upon appearance have had mixed results,[6] one of the legal problems with such claims is the inherent vagueness of the concept of physical attractiveness or beauty itself.[7]

What makes the concept of "beauty" vague and impossible to enforce in the Title VII area is precisely what makes the concept particularly inappropriate for jury instructions. Our courts have been particularly

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[5] *See* D. Rhode, "The Injustice of Appearance," 61 *Stan. L. R.* 1033 (2009); R. Mahajan, "The Naked Truth: Appearance Discrimination, Employment, and the Law," 14 *Asian American L. J.* 165 (2007); I. Perry, "Buying White Beauty," 12 *Cardozo J.L. & Gender* 579 (2005-06).

[6] *Compare Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality) (Title VII violation where accounting firm told employee she needed to "walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.") *with Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc) (makeup requirement for females might violate Title VII, but rejecting claim in the particular case).

[7] *See, e.g., Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 914 (D. Nev. 2008) ("No Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal."); *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1348-50 (Fed. Cir. 2005) (term "aesthetically pleasing" in patent context is invalid because it is "completely dependent on a person's subjective opinion.").

sensitive to issues of bias, explicit or implicit, in the criminal justice system.[8] In contrast, a jury instruction that allows jurors to decide which crime applies in a particular fact situation based upon their determination of whether someone's "beauty" or "appearance" have been impaired or "render[ed] unsightly" or "imperfect," clearly can lead to discrimination based upon race or gender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and article I, section 12 (equal protection) or article XXXI, section 1 (gender discrimination)[9] of the Washington Constitution. *See generally State v. Burch*, 65 Wn. App. 828,

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[8] In *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), Justice Wiggins stated:

> In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. [Footnote omitted] Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.

*Saintcalle*, 178 Wn.2d at 46.

Notably, the United States District Court for the Western District of Washington is so concerned about implicit bias that it paid for a video to be produced and shown to all prospective jurors about the topic. *See* http://www.wawd.uscourts.gov/jury/unconscious-bias. The federal court has also drafted proposed instructions to the jury that address the issues as well. http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf.

[9] Article XXXI, the Equal Rights Amendment, was adopted with the purpose of ending "special treatment for or discrimination against either sex." *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 565, 740 P.2d 1379 (1987).

833-37, 830 P.2d 357 (1992) (setting out tests for equal protection and gender discrimination challenges regarding jury selection). The test, of course, is not whether in fact jurors did improperly apply the instruction in violation of equal protection and the equal rights amendment, but whether there was a reasonable likelihood a juror could have applied the law in an unconstitutional manner. *See Boyde v. California*, 494 U.S. 370, 379-80, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

That test is met here. Jurors raised in a culture that values white female beauty will more likely find that a particular bruise impairs the beauty of a woman of Western European descent with the stereotypical appearance of a model from *Cosmopolitan* than the situation where a male, from a non-Western European background, receives the same bruise. And while this calculus devalues the "beauty" of non-European males, the result is actually oppressive towards the white women whose "beauty" is put on a pedestal.[10] In any case, such consideration of gender or race conflicts with settled notions that the jury system should be free from bias and that the existence of bias in the jury system harms society as a whole. *See, e.g., J.E.B. v.*

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[10] *See, e.g.*, H. Cheng, A. Tran, E. Miyake, & H. Kim, "Disordered Eating Among Asian American College Women: A Racially Expanded Model of Objectification Theory," 64 *J. Counseling Psych.* 179 (2017); Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1991).

*Alabama ex rel. T.B.*, 511 U.S. 127, 140, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes. . . ."). In this way, Instruction No. 10 also violated the right to a jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 21 and 22.

Indeed, just recently, the U.S. Supreme Court held that where there is evidence that a juror made racist remarks during deliberations, the Sixth Amendment requires that the traditional rule against impeaching a jury verdict must give way to allow trial courts to consider evidence of the juror's comments. *Peña-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017). There, the juror stated during deliberations, that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." 197 L.Ed.2d at 116.

Instruction 10 here would have encouraged similar comments by the jurors, and encouraged jurors to convict Mr. Ferrer because some jurors might think that a bruise on a white woman of Western European origin would diminish her beauty or made her "unsightly" more than a similar bruise on an African-American male, for instance. Thus, Instruction No. 10 not only

violates the Equal Protection clauses of the state and federal constitutions and the Washington ban on gender discrimination, it also is unconstitutionally vague and violates due process protected by the Fourteenth Amendment and article I, section 3. *See State v. Stubbs*, 144 Wn. App. 644, 184 P.3d 660 (2008), *rev'd on other grounds* 170 Wn.2d 117, 240 P.3d 143 (2010) (jury instruction is unconstitutionally vague if it lacks a "commonsense meaning that juries could understand") (citing *Tuilaepa v. California*, 512 U.S. 967, 976, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) and *State v. Elmore*, 139 Wn.2d 250, 289-90, 985 P.2d 289 (1999)). Here, "beauty," "unsightly," and "imperfect" are just too amorphous to give to a jury to decide someone's fate.

Below, the State argued in favor of Instruction No. 10 by citing *State v. Atkinson*, *supra*. RP IV 707-11. As noted, the trial court in *Atkinson* did give the jury a definition of "disfigurement" that tracked Instruction No. 10 in this case, using dictionary definitions, and Division Three rejected arguments that this definition was overly broad, misstated the law, and misled the jury. 113 Wn. App. at 667-68.[11]

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[11] The Comment WPIC 2.03.01 (2015) endorses this approach ("The instruction's definition uses the word 'disfigurement.' The jury may be further instructed on the meaning of 'disfigurement' using the definition from Black's Law Dictionary. *State v. Atkinson*, 113 Wn.App. 661, 667–68, 54 P.3d 702 (2002).").

But *Atkinson* came out in 2002, in a different era when courts (and litigants) were not as concerned about implicit bias in the legal system. Notably, the case does not address issues related to sexism and racism, and the discussion in the case only addressed whether it was proper to give an instruction that supplemented and clarified the statutory language. Because Division Three never addressed whether a "disfigurement" definition based upon subjective concepts of "beauty," "unsightly," and "imperfect," perpetuate racist and sexist stereotypes, it offers no guidance in this case.[12] *Atkinson* therefore should not be followed in this case.

#### 4. *Instruction No. 10 Violated Due Process and Constituted a Comment on the Evidence By Diminishing the State's Burden of Proof*

*Atkinson* should also not be followed because it pre-dated this Court's decision in *State v. Dolan*, *supra*. In *Dolan*, this Court reversed a conviction for assault of a child in the second degree where a trial court instructed the jury that it could find substantial bodily harm based on the presence of bruising and swelling. 118 Wn. App. at 331. The Court disapproved of giving such a definition, holding that the instruction was confusing, that it could

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[12] *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.").

mislead the jury as to its duties, and that it could be construed as a comment on the evidence in violation of article IV, section 16 of the Washington Constitution. *Dolan*, 118 Wn. App. at 330-31.

"An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A jury instruction that resolves a disputed factual issue constitutes an impermissible comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997).

A judicial instruction that is a comment on the evidence also weakens the State's burden of proving guilt beyond a reasonable doubt to a jury, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. When a judge gives the jury an instruction that diminishes the

burden of proving a statutory element, this is equivalent to a mandatory presumption and a directed verdict.[13]

Instruction No. 10 fits into this category. The language in the instruction is not authorized by statute – nothing in the RCWs defines "disfigurement" in terms of a juror's perceptions of beauty. Therefore , the instruction not only was a comment on the evidence, by which the judge told the jurors to find disfigurement if "beauty" or "appearance" was "impaired" or rendered "unsightly" or "imperfect," but the instruction weakened the State's burden of proof, by allowing for conviction based upon a factor not authorized by the Legislature.[14]

Defense counsel was correct when he argued that jurors should be left with their own understanding of the word "disfigurement." RP IV 708-09. It was constitutional error in this case to go farther and to give an instruction that allowed the jurors to convict Mr. Ferrer of a felony, rather than a gross

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[13] *See, e.g., State v. Becker*, 132 Wn.2d at 65 (special verdict form that constituted a comment on the evidence relieved State of burden of proof and "was tantamount to a directed verdict"); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict."); *Smith v. Curry*, 580 F.3d 1071 (9th Cir. 2009) (habeas relief granted where judge coerced verdict from hung jury by commenting on the evidence and using mandatory language).

[14] *See State v. Ogden*, 21 Wn. App. 44, 49, 584 P.2d 957 (1978) (inference of intent instruction not authorized by statute constituted error of law); *State v. Budinich*, 17 Wn. App. 336, 337-38, 562 P.2d 1006 (1977) (a matter may be properly argued, but should not be the subject of an instruction).

misdemeanor, based upon subjective determinations of beauty and imperfection, not authorized by the Legislature.

### 5. *The Error Was Not Harmless*

"[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The State cannot meet its high burden.

One of the main issues was whether Mr. Ferrer committed assault in the fourth degree or assault in the second degree. His entire trial strategy centered around showing that he only committed a gross misdemeanor. He was partially successful because not all jurors agreed that the State proved the strangulation alternative. And while the jurors did not need to be unanimous as between the alternative means of committing the crime of assault in the second degree, Inst. No. 7, CP 44, the lack of unanimity on the "strangulation" meant that the instructions related to the "substantial bodily injury" prong were very important – if the jurors had a reasonable doubt as to "substantial bodily injury" and were not unanimous as to "strangulation," the jurors were instructed to consider assault in the fourth degree, and would

likely have convicted of only that offense. Inst. Nos. 20 & 29, CP 57 & 67. The error in the instructions defining "disfigurement" therefore was prejudicial, particularly given how the State argued to the jury that it could find Mr. Ferrer guilty based upon Instruction No. 10 if it did not find there was "strangulation." RP V 757-59.

Accordingly, the error cannot be written off as harmless. Reversal of the conviction for assault in the second degree and a remand for a new trial is the remedy.

## E. CONCLUSION

For the foregoing reasons, the Court should reverse the conviction in Count I and remand for a new trial.

DATED this 13th day of April 2017.

Respectfully submitted,

s/ Neil M. Fox
NEIL M. FOX, WSBA NO. 15277
Attorney for Appellant

APPENDIX A

INSTRUCTION NO. 10

"Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

APPENDIX B

INSTRUCTION NO. 7

To convict the defendant of the crime of Assault in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 22, 2014, the defendant:

(a) intentionally assaulted Kristina Ferrer and thereby recklessly inflicted substantial bodily harm; or

(b) assaulted Kristina Ferrer by strangulation; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ.

Jury Instruction No. 20

The defendant is charged with one count of Assault in the Second Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the Fourth Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 22

To convict the defendant of the crime of Assault in the Fourth Degree on Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 22, 2014, the defendant assaulted Kristina Ferrer, and

(2) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

FILED

MAY 13 2015

5:20pm

Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

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|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff,<br><br>v.<br><br>ANDRES SEBASTIAN FERRER,<br><br>Defendant. | No. 14-1-00656-0<br><br>**SPECIAL VERDICT FORM 1 – ELEMENTS WITH ALTERNATIVES** |

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNT 1.

We, the jury, return a special verdict by answering as follows:

QUESTION 1: Did the defendant intentionally assault Kristina Ferrer and thereby recklessly inflict substantial bodily harm?

ANSWER: yes (Write "yes" or "no" or "not unanimous")

QUESTION 2: Did the defendant assault Kristina Ferrer by strangulation?

ANSWER: not unanimous (Write "yes" or "no" or "not unanimous")

DATED this 13th day of May, 2013.

Julie Tebin
PRESIDING JUROR

WPIC 190.09

122A

0-000000071

JAB

STATUTORY APPENDIX

## Relevant Statutory Provisions and Rules

CR 46 provides:

> Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

CrR 6.15(c) provides:

> (c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

CrR 8.6 provides:

> Exceptions Unnecessary. CR 46 shall govern exceptions to rulings and orders in criminal cases.

RAP 2.5(a) provides:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RCW 9A.04.110 provides in part:

> (4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
>
> (b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part . . .

RCW 9A.36.021 provides:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.041 provides:

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine

or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 16 provides:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Wash. Const. art. XXXI, § 1 provides:

> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

| | |
|---|---|
| STATE OF WASHINGTON,<br>Respondent<br>v.<br>ANDRES SEBASTIAN FERRER<br>Appellant. | NO. 47687-8-II<br><br>CERTIFICATE OF SERVICE |

I, Alex Fast, certify and declare as follows:

On April 13, 2017, I served a copy of the SUPPLEMENTAL BRIEF OF APPELLANT by depositing copies into the U.S. Mail with proper first class postage attached in envelopes addressed to:

Aaron Bartlett
Clark County Prosecuting Attorney's Office
PO Box 5000
Vancouver, WA 98666-5000

Mark Muenster
1010 Esther St
Vancouver, WA 98660-3028

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4.13.2017 - SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEX FAST



Law Office of Neil Fox, PLLC
2125 Western Ave., Suite 330
Seattle, Washington 98121
206-728-5440